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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 74-107

PETER PREISER, Commissioner of Correctional Services of New York State, and HAROLD BUTLER, Superintendent of Wallkill Correctional Facility,

Petitioners,

against

JAMES NEWKIRK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners, Peter Preiser, the Commissioner of Correctional Services of the State of New York, and Harold Butler, the Superintendent of Wallkill Correctional Facility, pray that a writ of certiorari issue to review a decision of the United States Court of Appeals for the Second Circuit in the case of *Newkirk* v. *Butler*, which was decided on June 3, 1974.

Opinions Below

The decision of the Court of Appeals which petitioners seek to review is not yet reported. It is reproduced as appendix A. The final judgment of the District Court,

dated October 26, 1973, which was affirmed in part and modified in part by the Court of Appeals, is reproduced as appendix B. The opinion of the District Court, dated October 9, 1973, is reported at 364 F. Supp. 497, and is reproduced as appendix C. The decision of the District Court, dated July 31, 1972, denying respondent Newkirk's motion for a preliminary injunction, is not reported, and is reproduced as appendix D.

Jurisdiction

The decision of the Court of Appeals was handed down on June 3, 1974. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

Question Presented

Whether a prison inmate who is transferred within a state from a medium security institution to a maximum security institution, without the imposition of disciplinary punishment, is entitled under the Due Process Clause of the Fourteenth Amendment to notice of the reasons for the transfer and an opportunity to be heard?

Statement of the Case

A. Prior Proceedings

This action was commenced by respondent Newkirk and three other New York State prison inmates in July, 1972 in the United States District Court for the Southern District of New York. Newkirk and his co-plaintiffs complained that they had been transferred from Wallkill Correctional Facility, a medium security institution to various maximum security facilities throughout the state, in violation of their rights under the Constitution and under 42 U.S.C. § 1983. Newkirk and his co-plaintiffs sought a preliminary injunction from the District Court, directing their return to Wallkill and preventing petitioners from transferring them in the future without due process procedures.

On July 31, 1972, the District Court denied the motion for a preliminary injunction. The Court held that to grant Newkirk and his co-plaintiffs the relief they sought, would be to grant them everything they could obtain if they were successful at trial. The Court stated that the injury suffered by the inmate plaintiffs did not impress it as severe, and that they had not demonstrated a strong likelihood of success on the merits. The Court further stated that a retransfer of the inmates to Wallkill might be injurious to the institution and injurious to the inmates themselves (Appendix, p. 45).

Subsequently, on November 27, 28 and 29, 1972 a trial was conducted by the District Court. At this time two of the four plaintiffs had been released on parole, and their cases were dismissed. The District Court heard testimony from respondent Newkirk, his co-plaintiff, Cornelius Lucas, and two other witnesses on their behalf. The Court also heard testimony from petitioner Butler, and from a deputy commissioner of correctional services, on his behalf. At the close of the trial, before any decision had been rendered by the District Court, petitioner Butler agreed to return respondent Newkirk and his co-plaintiff to Wallkill Correctional Facility.

On December 18, 1972 respondent Newkirk was restored to the truck driving job at Wallkill, which he had held prior to his transfer from that institution. On February 22, 1973, his co-plaintiff, Cornelius Lucas, was released on parole. Petitioners moved on April 3, 1973 to dismiss the case as moot, and their motion was granted by the District Court as to Cornelius Lucas, but denied as to respondent Newkirk.

In a decision dated October 9, 1973, the District Court held that respondent was denied due process of law by

being transferred from Wallkill to a maximum security facility, without prior warning of the conduct that would lead to a transfer or the fact that a transfer was a possibility. The Court also noted that in the circumstances of respondent's case, his transfer was as much a disciplinary measure as others for which an administrative hearing is provided in the prison rules, and that there was no clear and present danger sufficient to justify a transfer without warning (Appendix, p. 34).

On October 26, 1973, the District Court issued a final judgment declaring that respondent's interest in continuing to remain at Wallkill was sufficiently great that transfers in direct response to his activity deserved some sort of due process, at the very least the knowledge that it was a possibilty. The District Court further declared that respondent could not be transferred without being afforded prior notice of the rules of the institution and the acts on his part which would lead to his being transferred, and without being afforded a hearing at which he was advised of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal, either prior to or shortly after the transfer. The District Court also declared that respondent was entitled to know the scope of permissible behavior at Wallkill and the circumstances which in petitioners' judgment would warrant his transfer to another prison (Appendix, p. 32).

Petitioners appealed the District Court's decision and judgment to the Court of Appeals for the Second Circuit. On June 3, 1974 that Court rendered a decision affirming and modifying the decision of the District Court. The Court of Appeals agreed with the District Court that respondent was entitled to minimal due process procedures before being transferred from a medium security institution to a maximum security institution, but it reversed the requirement that respondent was entitled to know in advance all of the acts on his part that would lead to a

transfer (Appendix, p. 21). The Court of Appeals also held that respondent's case was not moot in spite of his return to Wallkill, and that he was entitled to relief from the District Court.

B. Facts

At the trial in the District Court, the following salient testimony was elicited from the parties and witnesses.

Respondent Newkirk testified that he had been a New York State prison inmate since his conviction for murder in the second degree in 1962. He stated that prior to his placement at Wallkill Correctional Facility, he had been incarcerated at Ossining Correctional Facility, Attica Correctional Facility, Green Haven Correctional Facility and Auburn Correctional Facility (all of which are located in different parts of the state). He stated that upon his transfer to Wallkill, he was permitted to take instruction in auto mechanics, and later permitted to drive a truck and to leave the grounds in a truck. He said he attended classes in mathematics, English and history, and also engaged in musical activities by playing in a band and practicing his musical instruments during his leisure time. He said he was permitted to go about the institution on his own.

Newkirk stated that on June 8, 1972 he was performing his usual truck driving duties, when he was ordered to report to the prison hospital, while his belongings were packed by the guards. He said he was then transported to Clinton Correctional Facility, a maximum security institution in another part of the state, without being advised of the reason for the transfer, and without being given an opportunity to be heard. He admitted, however, that when he previously was transferred between two other institutions, no official told him of the reasons for the transfer.

Newkirk said that when he was transferred from Wallkill to Clinton Correctional Facility, he was not given an assignment in driving or auto mechanics, but he accepted an

assignment to do housework in the Superintendent's residence. He said that no one forced him to accept this assignment, and that the residence was located outside the prison walls. He said his wage was fifty-five cents per day, which was the same wage he earned as a truck driver at Wallkill. He said he had requested a truck driving assignment upon his arrival at Clinton, but had not renewed his request because he believed he was on a waiting list.

Newkirk further stated that he had permission to keep his muscial instrument in his cell at Clinton, but because of his long working hours he did not have time to practice it. He said that he did not have access to as many recreational activities at Clinton as he had at Wallkill, and he was not able to pursue his interests in glass work, painting and stone ware, that he pursued at Wallkill. He also said that at Clinton he was not permitted to possess certain articles in his cell, such as a lamp or typewriter, which he possessed at Wallkill, and he was more limited in his access to showers and hot water, and visiting and telephone privileges.

Significantly, Newkirk acknowledged that he was not placed in disciplinary confinement upon his arrival at Clinton, and that he did not lose any good behavior allowances as a result of the transfer. He further acknowledged that his transfers between other institutions prior to his placement at Wallkill, had resulted in a diminution of family visits, and that his first assignments at Wallkill were to perform porter duties and to haul garbage, whereas his previous assignment at Auburn Correctional Facility was to repair automobiles. He further stated that his initial wage rate at Wallkill was twenty-five cents per day, whereas his initial wage rate upon his transfer to Clinton was thirty cents per day.

Newkirk stated that during the period preceding his transfer from Wallkill he became interested in the concept of an inmate labor union, and signed a union constitution

on May 31, 1972. He said that on June 2, 1972 another Wallkill inmate gave him a union petition to sign, and he did so, and passed it on to other inmates with instructions to return it to the inmate who gave it to him. He said that later in the evening he heard an announcement over the public address system from a member of the inmate liaison committee, stating that the liaison committee had not sanctioned the union petition, and would meet with any inmates who wished to discuss the matter. Newkirk said that he did not become involved in any arguments, fights or threats over the union issue, and did not speak to any officers about it, and did not have further contact with authorization forms prior to his transfer from Wallkill on June 8, 1972.

Coy Smith, a former Wallkill inmate, testified on Newkirk's behalf. Smith said that on June 2, 1972 he did not observe any unusual activity, but he recalled an announcement over the public address system by a member of the inmate liaison committee. Coy remembered that the announcement stated that the inmate liaison committee was not responsible for the circulation of union petitions, and that the committee would meet with inmates at a designated place to answer questions about its position.

Smith said that fifteen or twenty inmates met with the members of the liaison committee on that night. Some inmates wanted to know why the committee was not supporting the union if the committee was supposed to represent the inmates, and one committee member was telling the inmates that the committee would support the union if it went through proper channels. Smith said that there were no fights or threats, but that there was some heated discussions, and that the inmates were speaking in loud voices trying to outtalk each other. He said that some inmates hollered back and forth, and some inmates did not like the way the inmate liaison committee member was answering questions. He said the inmates were not angry about having signed the petition, but that some of them were con-

fused about what they had signed and were fearful of administrative reprisals.

Smith acknowledged that he had not been disciplined for signing a union constitution, and that petitioner Butler had questioned him about it, but no action was taken against him, and he was paroled in September, 1972.

Eugene Eisner, an attorney specializing in labor law, also testified on behalf of Newkirk. He described the steps that were being taken to place the union petition of the Wallkill inmates before the New York State Public Employees Relation Board.

Walter Dunbar, a former deputy commissioner of correctional services, testified on behalf of petitioners. Dunbar stated that his experience in the correctional field included being a corrections officer, a supervisor of a crime study commission in California, a training officer of all personnel in the California Department of Corrections, an associate warden, a deputy director and director of the California Corrections Department; a chairman and member of the United States Board of Parole, a past president of the American Correctional Association, an editor of the *Manual of Correctional Standards,* and a member of the United States Attorney General's task force for innovative grants to improve corrections.

Dunbar said that there are a variety of reasons why an inmate may be transferred between correctional facilities. These include different quotas for different programs, an individual's adjustment to his assignment, critical information that indicates a danger to staff or personnel, and separation of inmates due to prior criminal experience together or hatred of one another. He said that transfer decisions are made at the institutional level by the superintendent and the classification committee, and made at the departmental level by a director of classification and movement. He said that where transfers are

necessitated by problems at institutions, a superintendent has the prerogative and responsibility to bring the matter to the attention of the correction department. He said that a superintendent has an acute responsibility to insure the safe and secure operation of his institution, and this may include dangerous or recalcitrant inmate behavior, homosexual triangles, the threat of violence between individuals, the threat of weapons being introduced, and other behavior which would disturb the order and stability of the institution.

Dunbar further stated that giving advance notice to an inmate prior to a transfer might create a security problem, because the inmate might resist violently, and other inmates might attempt to assist him. He said that conducting hearings would also create a problem because the revelation of confidential information leading to a transfer would be hazardous to the inmate or others. As an example he intimated that a superintendent could not run the risk of permitting weapons or drugs to be introduced into an institution before taking action to prevent it.

Dunbar stated that in the instant case a member of the department's classification staff had informed him that due to the circulation of petitions at Wallkill, there was a possibility of a confrontation between inmates of a different point of view, and a possibility of violence which warranted the transfer of certain inmates. Dunbar said that upon respondent's transfer from Wallkill to Clinton, there was no directive that respondent be placed in segregation, or lose any good behavior allowances, or suffer any punishment or deprivation of privileges as a result of the transfer.

Petitioner Butler testified on his own behalf. He stated that he began his career as a prison guard, and worked his way up to sergeant, lieutenant, assistant deputy superintendent, deputy superintendent, deputy commissioner in the correction department and Superintendent at Wallkill.

He said that Wallkill was a medium security institution with cells left open twenty-four hours per day, and a perimeter wire fence surrounding a portion of the facility. He said that it had extensive academic and vocational training programs, and many innovative programs that other institutions do not have. He said that Wallkill did not have a special housing unit or an isolation wing, and that inmates were chosen to go there by the Wallkill staff, and did not have a right to go there.

Butler stated that if there were hostilities between inmates, they would have to be transferred from Wallkill, whereas at maximum security institutions they would be placed in special housing for their own protection. He said that it would be impossible to isolate or segregate or control any section of the facility. He said that during the eighteen months prior to trial, 59 inmates had been transferred from Wallkill to other institutions, eighteen of which were deemed unsuitable for the Wallkill program. He said that these cases involved some inmates who were engaged in homosexual activities, some inmates who refused to become involved in the Wallkill program, and one inmate who was involved in a serious fight. He said that when inmates are transferred as unsuitable they are usually brought up on disciplinary charges, but that not all transfers were based on disciplinary offenses.

Butler said that he would not necessarily speak to an inmate prior to transfer, since it would depend on the purpose of the transfer. He said that in an emergency situation a telephone call is made to the central office, and the central office generally accepts the request and determines which institution the inmate is sent to. He said that the officers remove the inmate to the prison hospital while his belongings are packed and recorded on a transfer sheet, and then transport the inmate with his belongings to another facility. He said this procedure is followed to prevent inmates from barricading themselves in their cells or

encouraging fellow inmates to assist them in preventing the transfer.

With respect to the instant case, Butler said that on June 2, 1972 he received a telephone call at home, at 6:30 P.M., from an officer, who told him that a number of inmates were circulating a petition. Butler said that he was advised that there was no difficulty, and he told the officer not to interfere with the petition, but to keep the situation under observation and control. Butler said that he received a second phone call one hour later, telling him that the inmate liaison committee members were very disturbed because they had learned that the petitions were purportedly being circulated as having been sponsored by them. Butler spoke to one of the committee members, who asked to address the inmates over the public address system, to advise them that the committee did not sponsor the circulation of the petitions. Butler heard the inmate's prepared statement over the phone, and then gave him permission to use the public address system.

Butler said he received a third telephone call about one-half hour to one hour later, in which the officer advised him that unrest and tension had developed, and that there were loud arguments erupting in various parts of the institution. Butler ascertained that no fights had occurred and he told the officer to keep the matter under careful supervision and to let him know if anything developed. Nothing further happened that night, and the institution remained calm on the next two days, June 3 and 4, 1972.

On June 5, 1972, Butler asked a deputy superintendent to investigate the situation with respect to the union petitions, and the deputy reported that there was considerable tension, and that a group of inmates had been very vocal in their support of an inmate labor union, and the members of the inmate liaison committee were equally vocal in assuming that the union would detract from their authority or make their function useless. On June 6, 1972, Butler

called the central office and told them that there were a number of inmates who were creating a situation that could lead to trouble, and that he would like to transfer them to other facilities without disciplinary action. Butler said that he was fearful that at the upcoming Saturday night movie, an argument or serious discussion might end up in a riot. Butler also directed a supervisory officer to be present at the weekly meeting of the inmate liaison committee, to insure that no trouble occurred there.

Butler said that the assistant deputy superintendent reported to him that there were eight inmates, including plaintiffs, who were continuing to voice support for the inmate union, and that he was fearful that there may be trouble. He said that he conferred with his staff and decided to transfer five of these men, who were active in support of the union. Butler said that he did not normally oppose the circulation of petitions at Wallkill, but he was concerned about the union petition because of the attitude of the inmate liaison committee and other inmates against the petition. He said that he did not confiscate the petitions to prevent them from leaving the institution.

With respect to the five inmates who were transferred, Butler did not institute any disciplinary proceedings against them, and did not cause them to lose any good time or to be placed in segregated confinement, or to be treated differently at the receiving institutions. At the time of the trial, two of the five already had been paroled, as were various other inmates who had participated in the union activities. [As we noted previously, respondent's co-plaintiff was paroled subsequent to the trial, and his case was dismissed by the District Court as moot].

Reasons Why Certiorari Should be Granted

This Court should determine whether a prison inmate who is transferred between a medium security institution and a maximum security institution within a State, is entitled to a due process hearing, where no disciplinary punishment is imposed as a result of the transfer.

In its recent decisions on the subject of prisoners' rights, this Court clarified some of the important issues that have divided the lower federal courts. In *Wolff* v. *McDonnell*, 42 U.S.L. Week 5190 (June 24, 1974), this Court delineated the due process rights of prison inmates who were facing disciplinary punishments. In *Pell* v. *Procunier*, 42 U.S.L. Week 4998 (June 24, 1974), and *Saxbe* v. *Washington Post Co.*, 42 U.S.L. Week 5006 (June 24, 1974), this Court dealt with the power of prison officials to regulate confidential visits between prison inmates and newsmen. In *Procunier* v. *Martinez*, 42 U.S.L. Week 4606 (April 29, 1974), this Court defined the standards to be applied to the censorship of prisoners' mail, and struck down regulations which arbitrarily restricted attorney-client interviews. In *Warden* v. *Marrero*, 42 U.S.L. Week 4955 (June 19, 1974), this Court determined that federal prisoners who were convicted of narcotic offenses under former § 7237(d), 26 U.S.C., were not eligible for parole consideration in spite of the subsequent repeal of that statute.

The question of whether federal and state prisoners who are transferred between penal institutions are entitled to some form of due process procedures, is an issue that has divided the lower federal courts, and requires resolution by this Court. Some courts have held that such transfers, whether interstate or intrastate, require no due process procedures, while other courts have held that such transfers must be accompanied by full due process guarantees,

including confrontation and cross-examination of adverse witnesses. Some courts have held that there is a distinction between interstate and intrastate transfers, while other courts have rejected this distinction.

In *Kessler* v. *Cupp*, 372 F. Supp. 76 (D. Or. 1973), the court held that an inmate who was subjected to a non-consensual interstate transfer, was entitled to notice of the transfer, an opportunity to be heard and to confront adverse witnesses, representation by a lay advocate, a record of the hearing, and a review of the decision by the Superintendent and by higher administrative authorities. Similar relief was granted in *Ault* v. *Holmes*, 369 F. Supp. 288 (W.D. Ky. 1973), and *Noitt* v. *Vitek*, 361 F. Supp. 1238 (D. N.H. 1973).

Other federal courts have held that inmates facing involuntary out-of-state transfers are entitled to less extensive due process rights. See, e.g. *Gomes* v. *Travisono*, 490 F. 2d 1209 (1st Cir. 1973), vacated and remanded, —— U.S. —— (July 8, 1974); *Croom* v. *Manson*, 367 F. Supp. 586 (D. Conn. 1973); *Park* v. *Thompson*, 356 F. Supp. 783 (D. Ha. 1973); *Capitan* v. *Cupp*, 356 F. Supp. 302 (D. Or. 1972). Cf. *Bryant* v. *Hardy*, 488 F. 2d 72 (4th Cir. 1973) (district court should evaluate circumstances surrounding inmate's transfer from reformatory in Virginia to penitentiary in Illinois). Some courts have held that inmates who are transferred between states have no right to any due process procedures. See, e.g. *Fajeriak* v. *McGinnis*, 493 F. 2d 468 (9th Cir. 1974); *Hillen* v. *Director*, 455 F. 2d 510 (9th Cir. 1972), *cert. denied* 409 U.S. 989 (1972); *Batchelder* v. *Kenton*, —— F. Supp. ——, 3 Prison L. Rptr. 93 (C.D. Cal. Feb. 5, 1974).

The cases involving intrastate transfers of prisoners have also produced conflicting decisions. In *Stone* v. *Egeler*, —— F. Supp. ——, 3 Prison L. Rptr. 84 (W.D. Mich. Dec. 18, 1973), the court held that two Michigan inmates who were transferred 420 miles for disciplinary

reasons were entitled to a due process hearing. In *White* v. *Gillman*, 360 F. Supp. 64 (S.D. Iowa 1973), and in *Walker* v. *Hughes*, —— F. Supp. ——, 3 Prison L. Rptr. 109 (E.D. Mich. 1974), the courts held that inmates who were transferred from reformatories to long term adult prisons, were entitled to due process hearings. In *Aikens* v. *Lash*, 371 F. Supp. 482 (N.D. Ind. 1974), the court held that inmates who were transferred from a reformatory to a penitentiary, and routinely placed in segregation at the penitentiary, were entitled to due process hearings. In *Bundy* v. *Cannon*, 328 F. Supp. 165 (D. Md. 1971), the court held that transfers between institutions of different custody levels did not require hearings, but that placement in segregation at the receiving institution did require due process procedures.

In *Schumate* v. *People of the State of New York*, 373 F. Supp. 1166 (S.D.N.Y. 1974), and in *Beatham* v. *Manson*, 369 F. Supp. 783 (D. Conn. 1973), the courts held that transfers between state institutions did not require due process procedures unless there was a change in custody level, as in the instant case. In *Benfield* v. *Bounds*, 363 F. Supp. 160 (E.D. N.C. 1973), the court held that transfers between state institutions were entirely a matter of administrative discretion. In *Gray* v. *Creamer*, 465 F. 2d 179 (3d Cir. 1972), the court held that a state prisoner has no vested right to remain in any particular prison.

These conflicting decisions make it apparent that this Court should resolve the transfer issue at the earliest possible time. A resolution of this issue is needed in the field of correction because of the variety of reasons underlying the uses of transfers by prison administrators.

Transfers are one of the primary management tools for the protection and rehabilitation of prisoners. It is well known that in penal institutions where large numbers of men are held in close custody, there is a need for security and discipline that does not exist in civilian society. Jus-

tice White recognized this problem in *Wolff* v. *McDonnell*, *supra*, where he noted that many prisoners "are recidivists who have repeatedly employed illegal and often very violent means to attain their ends", and who "may have very little regard for the safety of others or their property or for the rules designed to provide an orderly and reasonably safe prison life." As a result of this lack of respect for persons and property, one of the most serious problems facing prison administrators is assaults by inmates against fellow inmates. The recent case law is replete with instances where prison officials have been sued for damages for failing to protect inmates from prisoner assaults. See, e.g., *Woodhous* v. *Commonwealth of Virgina*, 487 F. 2d 889 (4th Cir. 1973) ("A prisoner has a right, secured by the eighth and fourteenth amendments, to be reasonably protected from constant threat of violence and sexual assault by his fellow inmates, and he need not wait until he is actually assaulted to obtain relief"). See, also *United States ex rel. Miller* v. *Toomey*, 479 F. 2d 701 (7th Cir. 1973); *Parker* v. *State*, 282 So. 2d 483 (La. Sup. Ct. 1973). While the courts have generally denied recovery in these cases, they have put the prison officials on notice that reckless exposure of inmates to assaults by other inmates, will subject the officials to liability for damages.

The protection of individual inmates from each other is only one of the reasons why prison administrators need to transfer prisoners between institutions, often without warning and without delay. Another serious problem is the prevention of violent confrontations between prisoners and guards, and between rival groups of prisoners, which often have tragic consequences in a penal institution. Commonly, a warden will receive confidential information that a disturbance is being planned or that two groups of inmates are about to have a confrontation. Rather than wait for a conflagration to take place, particularly at a medium security or minimum security facility, a prison administrator must summarily remove the suspected

trouble makers to a different institution, where their potential for harm is immediately minimized. Similarly, after a riot has taken place, it is often necessary to separate groups of inmates by placing them at different facilities.

The power to transfer prisoners is also essential to the establishment of effective rehabilitation programs. Whether a prisoner should remain at one institution or another, is a classification decision that must be made by a correction department on the basis of a prisoner's background and institutional record. A decision to place an inmate at a particular institution, or to remove him from an institution, is an essential management function which requires expertise in the correctional field. In addition, the need to transfer prisoners may be influenced by staff and budgetary considerations, that make it necessary to close down portions of facilities or to terminate special programs.

In recognition of these considerations, the laws of many states and federal law, empower correctional authorities to transfer prisoners between institutions at their discretion. See, e.g., N.Y. Correction, § 23; 18 U.S.C. § 4802 (United States Attorney General "may at any time transfer a person from one place of confinement to another"). In addition, the New England states and many of the Western states have entered into interstate compacts which permit them to transfer inmates to other jurisdictions, if serious disciplinary problems arise or if adequate facilities are not available. Many states also transfer prisoners to federal custody if they cannot control them in their own facilities.

The decision below did not deal with these complex issues of penal administration, but merely upheld the ruling of the District Court that respondent Newkirk was entitled to minimal due process procedures in the circumstances of his case. The Court of Appeals' statement that

the form of due process to be afforded to the transferred prisoner will presumably "be molded to suit the seriousness of the charges in each case and the deprivations threatened by the transfer", does not provide the guidance to correctional officials that is needed on this important issue.

Finally, this Court should resolve the legal question that is at the heart of this case, namely, whether the Due Process Clause applies to every loss of privilege and every deprivation that is suffered by a prison inmate during the course of his confinement. It is undisputed in the instant case that respondent Newkirk did not receive any disciplinary punishment or suffer any loss of good behavior allowances as a result of his transfer from Wallkill Correctional Facility to a maximum security institution. It is also undisputed that Newkirk's co-plaintiffs were released on parole subsequent to their transfers, indicating that the disputed transfers had no adverse affect on their eligibility for parole. (Newkirk is not eligible to meet the Parole Board until 1975).

The court below based its decision on the deprivation of living conditions and job and training opportunities that Newkirk experienced as a result of his transfer from Wallkill, and it held that this was a "substantial loss" which entitled Newkirk to minimal due process procedures. The court rejected the argument that Newkirk's case was distinguishable from the interstate transfer cases, because it believed that his placement at a correctional institution far from New York City meant that he suffered the same privations as a prisoner who is transferred out of state.

While petitioners do not deny that respondent experienced less privileges at a maximum security institution than at a medium security institution, petitioners do not believe that this necessarily calls into play the Due Process Clause, or that this reduction of privileges should be considered a "substantial loss" in a legal sense. In *Wolff* v.

McDonnell, supra, this Court drew a distinction for due process purposes, between revocation of parole and the imposition of disciplinary punishment within a prison. This Court held that a prisoner facing institutional charges is not entitled to the same degree of protection under the Due Process Clause as a parolee whose liberty is at stake in a revocation hearing. By analogy, a prisoner who is transferred without the imposition of disciplinary punishment or adverse consequences to his parole, may suffer less deprivations in a legal sense than a prisoner who is transferred for disciplinary reasons and immediately placed in solitary confinement at the receiving institution. Thus, some transferred prisoners may not be entitled to any due process procedures, while others may be entitled to the same procedures that apply for disciplinary offenses.

By focusing on the loss of job and training opportunities and the distance involved in respondent's transfer, the court below was establishing vague and unworkable criteria for due process, that only add confusion to a difficult area of constitutional law. In addition, the court's reasoning ignores respondent's testimony that he experienced similar losses of family visits and other privileges when he was transferred between maximum security institutions prior to his transfer to and from Wallkill.

While due process procedures may be helpful in making rational determinations in cases of disputed facts, they may not be constitutionally required in all cases where a person suffers a deprivation of a right or privilege. Cf. *Arnett* v. *Kennedy,* 42 U.S.L. Week 4513 (April 16, 1974). The instant case provides this Court with an opportunity to clarify the due process rights of prison inmates who are facing a loss of privileges without the imposition of disciplinary punishment, an issue which has implications for all persons in custodial institutions.

In light of the deep division among the lower federal courts on the rights of transferred prisoners, and in light

of the failure of the court below to deal with the broader issues in this case, petitioners believe that their application warrants plenary consideration by this Court.

CONCLUSION

Petitioners' application for certiorari should be granted.

Dated: New York, New York, August , 1974.

Respectfully submitted,

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Appendix A

Decision of United States Court of Appeals for the Second Circuit, dated June 3, 1974.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 979—September Term, 1973.

(Argued May 9, 1974 Decided June 3, 1974.)

Docket No. 73-2858

JAMES NEWKIRK,

Plaintiff-Appellee,

—against—

HAROLD N. BUTLER, Superintendent, of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,

Defendants-Appellants.

Before:

ANDERSON, FEINBERG and MANSFIELD,

Circuit Judges.

MANSFIELD, *Circuit Judge:*

On June 8 and 9, 1972, appellee James Newkirk and four other inmates of Wallkill Correctional Facility ("Wallkill" herein), a medium security institution, were summarily transferred to maximum security facilities in New York in response to their alleged activities in support of a prisoners' union at Wallkill. Newkirk and three of the

other four brought suit in the Southern District of New York pursuant to 28 U.S.C. §§ 1343(3), (4), and 42 U.S.C. § 1983 against the Superintendent of Wallkill and the State Commissioner of Correctional Services for a declaration that the transfers were in violation of the Constitution and laws of the United States and for injunctive relief. Prior to a decision in the action, which was tried in November, 1972, before Judge Robert J. Ward, sitting without a jury, all plaintiffs except Newkirk were released on parole and the action was dismissed as to them. Newkirk was returned to Wallkill but the action continued as to him. In a decision dated October 9, 1973, the district court held that the transfer violated the due process clause of the Fourteenth Amendment since it had been made without any explanation to Newkirk or opportunity to be heard. On October 23, 1973, the court entered a declaratory judgment accordingly, which, while denying injunctive relief, directed that no adverse parole action be taken against Newkirk, or punishment administered, because of the transfer and that Newkirk be told the "scope of permissible behavior at Wallkill and the circumstances which . . . would warrant his transfer to another prison." The Superintendent and State Commissioner appeal. With modification we affirm.

Wallkill is a unique state correctional facility because it permits its inmates, who live in rooms rather than cell blocks, maximum free time and freedom of movement and gives access to numerous recreational and rehabilitative programs not available at other state correctional facilities. Because of its several advantages, which are more fully described in the district court's opinion, see 364 F. Supp. 497 (S.D.N.Y. 1973), admission to Wallkill is generally sought after and usually comes only after a state prisoner has spent time at a maximum security facility and has undergone an extensive screening procedure.

Appellee Newkirk, after being convicted of second degree murder in 1962, was incarcerated at Sing Sing and

Green Haven before first applying in 1965 for admission to Wallkill, to which he was not admitted until 1971. At Wallkill he took instruction in auto mechanics, attended classes in mathematics, history and English, and, during his leisure time, played musical instruments and pursued other artistic interests. Newkirk also drove a truck at Wallkill and at times was permitted to leave the prison grounds as part of this employment.

Sometime prior to June 1972 several Wallkill inmates began circulating petitions to form an inmates' union. These activities were openly opposed, not by prison officials but by members of the elected Inmate Liaison Committee (the "Committee"), which had general responsibility for the processing of inmate grievances. On June 2, 1972, the Committee held a general meeting of the inmates at which it disclaimed any support for the union. The discussions at this meeting, although vociferous, were not violent. Newkirk, who had previously signed a proposed union constitution, did not attend this meeting but immediately prior to it received a union petition from a fellow inmate, signed it, and passed it along to another inmate.

Concerned about a possible threat to the stability of the prison, Lieutenant Connolly, the officer in charge of Wallkill on the evening of June 2, a Friday, telephoned reports to Superintendent Butler who had left Wallkill and was at his home for the weekend. Connolly also prepared a written report for Assistant Deputy Superintendent O'Mara in which he identified, based on what other officers had told him,[1] Newkirk as one of the inmates who had been canvassing for the union. On Tuesday, June 6, O'Mara recommended to Butler that eight inmates, including Newkirk, be transferred from Wallkill. Before making his

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[1] Connolly could not remember specifically which officers had identified particular inmates as participants in the union organizational drive.

recommendations O'Mara did not talk to Newkirk[2] and did not know who had observed him canvassing for the union or the extent of his activities. Butler decided to transfer Newkirk and four others on O'Mara's list without ever talking to the inmates involved and without personally observing any of their activities or even discussing the events of Friday evening with Connolly who was the officer in charge and who had never recommended that anyone be transferred. The transfers were accomplished on June 8 and 9 when the inmates were summoned to the prison infirmary and told they were being sent away immediately. They were not told the reason or given any opportunity to contest the action.

Newkirk was transferred to Clinton Correctional Facility where he was placed in a barred cell, openable only by a guard, and was unable to pursue many of the activities he had engaged in at Wallkill. Although he asked for a job involving auto mechanics or driving, he was employed by the Clinton Superintendent as a housekeeper at a salary less than what he had earned at Wallkill. Newkirk worked for the Superintendent seven days a week, often for 13 or 14 hours per day. Visits to Newkirk by members of his family were more restricted, since Clinton is located further from New York City, where Newkirk's family lives, than Wallkill.[3] In light of these and other deprivations suffered by Newkirk, and since the transfer was in direct response to his presumed activity in support of the inmates' union, the district court rejected appellants' argument that the transfer was "administrative," and hence beyond due process requirements, because it had not resulted from formal disciplinary proceedings and had not involved any loss of

[2] O'Mara recommended eight employees for transfer. He had talked to only one of them, Passanante, whom O'Mara placed at the bottom of his list for transfer since Passanante was "very scared" and "apparenlty willing to cooperate."

[3] Wallkill is located approximately 80 miles north of New York City, whereas Clinton, located outside of Plattsburgh, New York, is approximately 300 miles from New York City.

good time or segregated confinement. Specifically the court declared:

> "1) plaintiff Newkirk's interest in continuing to be situated at Wallkill is sufficiently great that transfers in direct response to his activity deserves some sort of 'due' process, at the very least the knowledge that it is a possibility;
>
> "2) transfer from Wallkill to maximum security institutions is used by the defendants for disciplinary purposes;
>
> "3) plaintiff Newkirk could not be transferred without being afforded due process, including
>
> a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred;
>
> b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to the transfer or if prompt action is essential, as soon thereafter as practicable; . . . ."

The court entered the above-described judgment (*supra*, p. 2) and denied appellants' requests for a resettlement which would limit the judgment to cases involving disciplinary transfers only and for a stay of that portion of the judgment directing appellants to notify Newkirk of the conduct that would lead to transfer from Wallkill.

Appellants argue that a hearing may be constitutionally required only for "disciplinary" transfers—i.e., transfers made as punishment for past rule violations.[4] See 7

[4] Appellants' brief (p. 22) states:

"Appellants do not quarrel here with the District Court's order insofar as it it holds that, as a matter of law, if an inmate

(footnote continued on following page)

N.Y.C.R.R. Part 250, et seq. They urge that transfers for other purposes (e.g., transfer to separate inmates who are hostile to each other or to prevent threatened disturbances before they occur, which involve no formal disciplinary proceedings, loss of good time, segregation, or adverse parole consequences) be classified as purely "administrative" and left within the exclusive discretion of prison officials. Besides being inappropriate in these cases, appellants argue, notice and a hearing might touch off exactly the disturbance which a transfer could avoid.

Classification by label (e.g., as "administrative" or "disciplinary") may facilitate prison administration but it cannot be used as a substitute for due process. In our view appellees' position gives insufficient consideration to the very real loss that an inmate may sufer even when his transfer is not part of formal disciplinary proceedings and has no adverse parole consequences. It also overlooks the danger that a transfer, when based on rumor or "confidential" information about an inmate's behavior, past or planned, may be arbitrary and unjustified by the facts. These factors, the adverse consequences to the prisoner and the chance of error, are the principal elements to be considered in determining what process is due the transferred prisoner, rather than the label put on the transfer. Where the prisoner suffers substantial loss as a result of the transfer he is entitled to the basic elements of rudimentary due process, i.e., notice and an opportunity to be heard. See *Gomes* v. *Travisono,* 490 F.2d 1209 (1st Cir. 1973); *Ault* v. *Holmes,* 369 F. Supp. 288

(footnote continued from preceding page)

> is transferred from Wallkill Correctional Facility solely as a disciplinary punishment in response to an act of misconduct, the inmate must, before or shortly after such transfer, be given notice of the gravamen of the misconduct and an opportunity to be heard in relation thereto. Indeed the regulations of the Department of Correctional Services require that disciplinary punishments be preceded by notice and hearing before punishment may be imposed (see 7 N.Y.C.R.R. Part 250 et seq.)."

(W.D. Ky. 1973); *Hoitt* v. *Vitek,* 361 F. Supp. 1238 (D.N.H. 1973); *White* v. *Gillman,* 360 F. Supp. 64 (S.D. Iowa 1973); *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972). See also *Landman* v. *Royster,* 333 F. Supp. 621, 645 (E.D. Va. 1971) (questioning distinction between deprivations constituting "punishment" and those presented as techniques for the maintenance of "control" or "security"). While no formal disciplinary proceedings were involved in the present case the district court found that Newkirk was deprived of living conditions and job and training opportunities for which he had waited for six years and which he was apparently eager to retain. Since this was a substantial loss he was entitled to know the reasons for the transfer, to be heard, and to be permitted to demonstrate the existence of factual errors in the basis for the discharge. Since his right to minimum due process is clear in the circumstances of this case, it becomes unnecessary for us to decide whether some form of due process is required in the case of every transfer of a prisoner. See *Gomes* v. *Travisono, supra* at pp. 1213-14.

Nor can a denial of due process to Newkirk be justified on the ground that his transfer was intrastate rather than to a prison outside the state (the situation in *Gomes*), since the deprivations in both cases were, as a practical matter, equally severe.[5] See *Stone* v. *Egeler,* —— F.Supp. ——, 3 Prison L. Rep. 84 (W.D. Mich. Dec. 18, 1973); *Aikens* v. *Lash,* 371 F. Supp. 482 (N.D. Ind. 1974); *White* v. *Gillman, supra.* "In a prison setting where liberty is by necessity shrunken to a small set of minor amenities, such as work or schooling privileges, visitations, and some modicum of privacy, it is likely that any marked change

[5] For example one of the privations referred to in *Gomes* was the increased difficulty of communication and visitation. See also *Capitan* v. *Cupp,* 356 F. Supp. 302 (D. Ore. 1972). Due to the increased distance of Clinton from New York City, see note 3 *supra,* and more limited telephone privileges, the same privations were suffered here.

of status which forecloses such liberties will be perceived and felt as a grievous loss." *Palmigiano* v. *Baxter*, 487 F.2d 1280, 1284 (1st Cir. 1973). See also *Diamond* v. *Thompson*, 364 F. Supp. 659, 664 (M.D. Ala. 1973). Indeed, in light of our decision that a substantial deprivation of benefits and privileges within the prison walls itself entitles a prisoner to some form of due process, see *Sostre* v. *McGinnis*, 442 F.2d 178 (2d Cir.), *cert. denied*, 404 U.S. 854 (1971), it would be something of a paradox if prison authorities could by transferring a prisoner for disciplinary reasons to another institution (within or without the state) deprive him of due process rights to which he would be entitled upon a transfer within the prison itself.

Fundamental fairness furthermore requires that substantial deprivations "should at least be premised on facts rationally determined." See *Sostre* v. *McGinnis*, *supra* at 198; *United States ex rel. Campbell* v. *Pate*, 401 F.2d 55, 57 (7th Cir. 1968) ("the relevant facts . . . must not be . . . capriciously or unreliably determined."); *Dunn* v. *California Dept. of Corrections*, 400 F.2d 340, 342 (9th Cir. 1968); *Shelton* v. *United States Board of Parole*, 128 U.S. App. D.C. 311, 388 F.2d 567, 576 (D.C. Cir. 1967) (en banc.)[6] Here the need for at last a rudimentary hearing, with Newkirk afforded a reasonable opportunity to explain his activities, was obvious. The Superintendent's decision to transfer Newkirk as a leading proponent of the inmates' union was based only on third-hand reports prepared by officers who had not personally observed Newkirk's conduct which, as it turns out, had apparently been limited to the single act of signing and passing along a union petition. A hearing might well have established that he was but a

[6] It is irrelevant, as appellants seem to suggest, whether the factual inquiry has anything to do with the possible commission of a crime or other rule violation. See *Goldberg* v. *Kelly*, 397 U.S. 254 (1968).

passive pawn in a larger power struggle,[7] who had not intended to involve himself in further union activities, particularly if they would jeopardize his continued presence at Wallkill.[8] Indeed, with respect to one of the other inmates transferred, the Superintendent conceded at the trial in the district court that a further investigation would have revealed significantly less involvement with the union than had originally been supposed. Where no hearing at all is granted and the inmate is never given any opportunity to respond to or contradict reports of his activities or intent, the risk of such mistakes is substantial. See *Gomes* v. *Travisono*, 353 F. Supp. 457, 462 (D.R.I.), *aff'd.*, 490 F.2d 1209 (1st Cir. 1973).

Turning to the district court's judgment, we believe that, with one or two modifications, it satisfactorily prescribes the minimum due process to which Newkirk is entitled. At the same time it does not attempt to foist a formal-type notice or hearing on the state. Presumably the form will be molded to suit the seriousness of the charges in each case and the deprivations threatened by the transfer. Furthermore the order recognizes that under some circumstances there may be compelling reasons for immediate transfer without notice and prior to hearing (e.g., where the transfer is made because of fear of an imminent prison uprising or because of fire, flood, outbreak of an epidemic, or the like) andaccordingly provides that "if prompt action is essential" the hearing may be held as soon after the transfer "as practicable." This provision permits prison officials to act immediately in instances where notice will

[7] According to Assistant Deputy Superintendent O'Mara, it was "reliably" reported that one union petition circulating through the Wallkill population included 225-230 signatures.

[8] We note that the one prisoner who was forewarned of his possible removal fron Wallkill, Passanante, quickly indicated his willingness to cooperate and, as a result, was placed at the bottom of O'Mara's list for transfer. See note 2 *supra*.

touch off the very disturbances which the transfer is designed to avoid.

In one respect, however, we believe that the order requires modification. Paragraphs (1) and (5)b of the order would require state prison officials immediately to inform Newkirk of all future activities or behavior on his part which would be grounds for transfer of him to another institution. While we agree that advance publication of rules governing the conduct of prisoners at Wallkill, to the extent that such rules can be formulated in clear and unambiguous terms, would serve the salutary function of avoiding misunderstanding and resentment on the part of the prison population, *Rhem* v. *McGrath*, 326 F. Supp. 681, 691-92 (S.D.N.Y. 1971), it would be impossible, other than through the use of vague and meaningless generalities, to set forth all acts on Newkirk's part that could conceivably require his transfer out of Wallkill. Compliance with this portion of the district court's order, as it stands, might also preclude the flexible exercise of discretion based on changing conditions within the "volatile atmosphere of a prison," see *Sostre* v. *Otis*, 330 F. Supp. 941, 945 (S.D.N.Y. 1971). We could not affirm such a requirement without placing prison officials in an unnecessary straitjacket. We therefore hold that the final order of the district court should be modified to delete from paragraph 1 the words "at the very least the knowledge that it is a possibility," from Paragraph 3(a) that part which directs that Newkirk be given prior notice of "what acts on his part would lead to his being transferred," and all of paragraph 5(b).

We find no merit in appellants' additional argument that Newkirk's action should have been dismissed as moot prior to the decision on the merits since prior thereto he had been returned from Clinton to Wallkill. Even after his return he remained subject to a new transfer at any time based on mere rumor or surmise which he had no opportunity to answer or refute. In light of the state's continued insistence on its policy of not providing the inmate with any opportunity to respond to information against him, the likelihood of such a transfer was concrete rather than remote, speculative, or contingent. See *Super Tire Engineering Co.* v. *McCorkle*, 42 U.S.L.W. 4507 (April 16, 1974); *Maryland Casualty Co.* v. *Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941); *McGrain* v. *Daugherty*, 273 U.S. 135, 181-82 (1927). See generally Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. Pa. L. Rev. 125, 137-47 (1945). Furthermore, notwithstanding the Superintendent's good faith assurances in support of appellants' motion for dismissal that there would be no adverse effects from the transfer as far as consideration for parole was concerned, we think that Newkirk was entitled to a judicial decree to that effect.

The judgment and order of the district court is affirmed as modified.

Appendix B

Final Judgment of United States District Court for the Southern District of New York, entered on October 29, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FINAL JUDGMENT

72 Civ. 2851
R.J.W.

JAMES NEWKIRK and CORNELIUS LUCAS,
Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,
Defendants.

This cause came on to be heard on November 27, 28 and 29, 1972, and was argued by counsel, and thereupon, upon consideration thereof, the court having rendered and filed an opinion and made and filed findings of fact and conclusions of law, all dated October 9, 1973, it is hereby

ORDERED, ADJUDGED and DECREED that the action is dismissed as to plaintiff Lucas and that defendants' transfer of plaintiff Newkirk from Wallkill Correctional Facility (hereinafter "walkill"), a medium security prison, to a maximum security prison on June 8, 1972 violated plaintiff's rights under the Constitution and laws of the United States, in that:

1) plaintiff Newkirk's interest in continuing to be situated at Wallkill is sufficiently great that transfers

in direct response to his activity deserves some sort of "due" process, at the very least the knowledge that it is a possibility;

2) transfer from Wallkill to maximum security institutions is used by the defendants for disciplinary purposes;

3) plaintiff Newkirk could not be transferred without being afforded due process, including

a) prior notice of the rules of the institution and what acts on his part would lead to his being transferred;

b) a hearing at which he was informed of the charges against him and afforded an opportunity to explain his behavior before a relatively impartial tribunal either prior to the transfer or if prompt action is essential, as soon thereafter as practicable;

4) the situation at Wallkill on June 8, 1972 did not represent so clear and present a danger to the security of the prison as to justify transferring plaintiff Newkirk without warning; and

5) plaintiff Newkirk is entitled to

a) have no adverse action taken against him whether with reference to parole or discipline, based on the fact of his transfer on June 8, 1972; and

b) know the scope of permissible behavior at Wallkill and the circumstances which in defendants' judgment would warrant his transfer to another prison.

Dated: New York, New York, October 26, 1973

/s/ Robert J. Ward
UNITED STATES DISTRICT JUDGE

JUDGMENT ENTERED OCTOBER 29, 1973
of Raymond F. Burghardt
Clerk

Appendix C

Opinion of District Court, dated October 9, 1973.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

72 Civ. 2851
R.J.W.

JAMES NEWKIRK and CORNELIUS LUCAS,

Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and RUSSELL G. OSWALD, Commissioner of Correctional Services of the State of New York,

Defendants.

WARD, D. J.

This is an action brought under 28 U.S.C. 1343 (3) and (4) and 42 U.S.C. 1983, seeking declaratory and injunctive relief against alleged unconstitutional punishment. The four original plaintiffs were inmates of Wallkill Correctional Facility ("Wallkill"), a medium security prison, serving sentences of imprisonment imposed by New York State courts. They were transferred from that institution to two maximum security institutions (plaintiffs Newkirk and Lucas to Clinton Correctional Facility, plaintiffs Oliver and Rodriguez to Auburn Correctional Facility) on June 8, 1972 by the orders of and under the authority of defendants Harold N. Butler, Superintendent of Wallkill, and Russell G. Oswald, Commissioner of Correctional Services of the State of New York.

The gravamen of the complaint is alleged imposition of punishment without due process of law, and solely for exercise of First and Sixth Amendment rights. The relief requested is a declaration that defendants had violated plaintiffs' constitutional rights, and an injunction ordering their return to Wallkill, expunging all record of their transfer, and prohibiting future transfers without a due process hearing.

Prior to the commencement of the trial, two of the plaintiffs, Oliver and Rodriguez, were released and the complaint was dismissed insofar as it related to them. Following the trial, plaintiff Lucas was released and the action is dismissed as to him as well. The action continues as to plaintiff Newkirk.

The transfers followed several weeks of activity during which plaintiffs had circulated for inmate signatures petitions to form a union at Wallkill. Obtaining the requisite number of inmate signatures was to be the first step in a process of gaining official recognition as a collective bargaining unit. This effort generated some vociferous controversy among the prisoners but was never forbidden or even actively discouraged by the prison officials, although they did watch closely and monitor the level of unrest within the prison. Tension among the inmates stemmed in part from the unwillingness of the existing prisoner representatives to support the petitions, and the consequent fear among other inmates that the authorities also opposed the efforts to unionize and that there would be reprisals against those who signed the petitions. The verbal controversy apparently peaked on June 2, 1972, with a general meeting at which the petitions were discussed in loud voices. The meeting dispersed peacefully and there were no incidents of violence or threats of violence. On June 8, after several days of apparent calm, the plaintiffs were summoned to the infirmary and informed that they were being transferred immediately. They were not told why or given any opportunity to contest the transfers.

The institutions to which the plaintiffs were transferred are maximum security institutions, and the conditions there contrast strikingly with those in Wallkill, a medium security institution. The cells are locked, the guards armed, the access to library and recreational facilities more limited, the space more crowded, and the rehabilitation programs significantly less extensive. The prisons are at a greater distance from New York City where these prisoners' families live, and visiting is therefore restricted; the use of the telephone to communicate with family is also limited. Additionally, the fact of transfer itself involved some hardships: the prisoners were kept for various times in segregation "for screening purposes" and were unemployed (on "idle" status) pending reassignment to work. Their eventual new jobs paid less than those they had performed at Wallkill.

Trial was accelerated in lieu of preliminary relief. After all the witnesses were heard, but before a decision was rendered, defendants represented that the remaining two plaintiffs were being returned to Wallkill. Counsel expressed the hope that the parties could stipulate to a consent order resolving the controversy, and decision was reserved. The settlement negotiations having broken down, defendants moved to dismiss the complaint as moot, since plaintiffs were no longer in the complained-of maximum security prisons, and three of the four plaintiffs had been released on parole. Plaintiff Newkirk opposes that motion, contending that the practices of defendants place him and other inmates under continuing fear of summary reprisal for the exercise of their First and Sixth Amendments rights.

For the reasons discussed below, the prayer for declaratory relief is granted, the prayer for an injunction ordering the return of the prisoners to Wallkill is dismissed as moot, and the prayer for an injunctiaon against future summary transfers is dismissed because in the present posture of the case there is not a sufficiently delineated controversy to merit its adjudication.

Newkirk contends that the action of defendants amounted to the imposition of significant punishment without due process of law, and solely for the exercise of his First and Sixth Amendment rights. Defendants reply that the transfers were an administrative, not a disciplinary, act, that therefore their discretion must remain unfettered, and that prisoners are not entitled to a due process hearing prior to transfer. They maintain, moreover, that if the activity of plaintiff was protected under the First and Sixth Amendments, there was sufficient justification in the urgency of the situation to merit their action. The issues raised are of such scope that a preliminary discussion of the applicable law is appropriate.

It can no longer be questioned that prisoners, while forfeiting, as a necessary corollary of prison life, significant rights and privileges enjoyed by the general populace, retain those basic rights which are not incompatible with the running of the penal institution.[1] Many cases in recent years have delineated the precise scope of these protections. Among those rights of prisoners which the courts will protect with special solicitude are the First Amendment right to hold and to express beliefs and to receive information, the Sixth Amendment right of access to the courts, and the Eighth Amendment right of freedom from cruel and unusual punishment, that is, from deprivation of the most basic human needs.[2] Any punishment imposed which infringes on these rights is examined with the strictest scrutiny, and the state must justify its acts by demonstrating the most pressing necessity. As Judge Weinfeld expressed the standard in *Fortune Society* v. *McGinnis*, 319 F. Supp. 901 at 904 (S.D.N.Y. 1970), the state must show ". . . a compelling state interest centering about prison security, or a clear and present danger of a breach of prison security, or some substantial interference with orderly institutional administration." These rights are not absolute, nor even as extensive as those enjoyed by the general populace; the prison authorities remain free to regulate,

for example, the manner of speech and the time and place of access to legal resources, to the extent justified by the true exigencies of maintaining prison discipline.[3] But the regulation must not be such as to abrogate the right, nor more restrictive than justified by the need for discipline.

Outside this area of constitutionally protected rights lies the realm of "day-to-day prison discipline" or administration in which courts and particularly federal courts are traditionally reluctant to interfere. The state and the prison authorities are free, in this area, to prescribe rules and discipline for infractions, with wide discretion and without the close scrutiny described above.[4]

In this realm, however, the courts have articulated the right of prisoners to be free from the arbitrary imposition of sanctions, even when basic rights are not infringed upon. Thus, the Court of Appeals for the Second Circuit in *Sostre* v. *McGinnis*, 442 F.2d 178, 198 (2d Cir. 1971), while rejecting the lower court's formulation of elaborate guarantees, stated, "We are not to be understood as disapproving the judgment of many courts that our constitutional scheme does not contemplate that society may commit lawbreakers to the capricious and arbitrary actions of prison officials . . . ," and mandated a certain minimal due process before severe sanctions were imposed. And in *Carothers* v. *Follette*, 314 F. Supp. 1014 (S.D.N.Y. 1970), Judge Mansfield said, "Although a prisoner does not possess all of the rights of an ordinary citizen he is still entitled to procedural due process commensurate with the practical problems faced in prison life . . ." at 1028. The amount of process which is "due" becomes the crucial question, decided by a balancing of the interest infringed upon against the needs of the prison system.

The classic statement of this balancing process was made in *Hannah* v. *Larche*, 363 U.S. 420 (1960) and repeated by the court in *Sostre, supra*.

> "[A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a particular proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." 363 U.S. at 442.

These rules of fair play apply whether the interest of the prisoner is called a right or a privilege, and whether the action of the official is deemed disciplinary or administrative. For ultimately the end of all prison discipline is the proper administration of the prison.

> "Rejection of the right-privilege distinction as a sterile form of words has likewise cast doubt upon the logical difference between deprivations constituting 'punishment' and those presented as techniques for the maintenance of 'control' or 'security'. Presumably the consequence of labeling a deprivation a matter of control is that it may be imposed without procedural preliminaries. The distinction is unpersuasive."
> *Landman* v. *Royster*, 333 F. Supp. 621 at 645 (E.D. Va. 1971).

Recent cases have enumerated the interests of inmates as well as the needs of the prison system. *Landman* v. *Royster, supra*, contained a particularly full discussion of the balance in the prison context. The opinion stated:

> "The Court must identify and analyze the precise nature of the individual interest at stake and compare it with the purpose and function of the governmental body. . . . The disciplinary function fulfilled in the decision to place a man in solitary confinement, to deny good time credit, to 'padlock' him in his cell involuntarily, or to impose the substantial disabilities

of maximum security confinement, adjudicates the question of a substantial deprivation or grievous injury. Whether cast in terms of a finding of unfitness to circulate in the general population or seen as a determination of guilt, the decision to place a man under greater than usual restraint is founded upon a finding of non-compliance with general prison standards. . . ." (333 F. Supp. at 652.) It continued, "A proper consideration is the effect that the introduction of procedural safeguards may have on legitimate prison functions, both within and without the ambit of discipline. . . .", citing security, administrator's leeway and time, speedy handling of some infractions on the spot. (at 652.)

See also, e.g., Sostre, supra; Carothers, supra; Bundy v. *Cannon,* 328 F. Supp. 165 (D. Md. 1971).

Throughout this balancing process, the touchstone is fundamental fairness: if the most elemental rules of fairness are violated, unwarranted by the exigencies of the situation, then the requisite due process has not been accorded. This assessment of fundamental fairness begins at the most basic level. Prisoners are entitled to know what the rules are, what actions will be met with sanctions.[5] They are entitled to know the general range of sanctions that may be imposed for given offenses. They are entitled to know, before punishment is imposed, the charge against them, and to explain their behavior, before a relatively impartial tribunal.[6] If the situation is such that prompt action is essential, the proper hearing must follow as soon as practicable. This is not to say that a "full due process hearing" is required, but simply procedural safeguards appropriate to the prison setting and sufficient to ensure against arbitrary action or action based upon erroneous information.[7]

In this context, we turn now to the specific situation before us. We need not decide today whether circulating

petitions for signatures as the first step toward obtaining official recognition of a union as a collective bargaining agent falls within the realm protected by the First and Sixth Amendments,[8] so that the rules and sanctions established by the authorities would be subject to the strict standard of scrutiny; it is thus also unnecessary to judge whether transfer to prevent circulation of the petitions was justified by the unrest caused. For it is apparent, on the facts before the court, that in the present situation, even treating this as an area fully within the discretion of the authorities to regulate, plaintiff's due process rights were violated at a basic level.

There were no explicit rules governing the conduct of these inmates; they were acting within what guidelines were made known to them. Communication among prisoners at Wallkill was not restricted; a room was provided for meetings; the authorities were fully aware that petitions for the union were being circulated for many days, before they transferred plaintiff. At no time was plaintiff requested not to circulate the petitions, nor was it officially indicated to him that this was a matter of concern to the auhorities. A large element of the unrest in fact resulted from the fear of some of the signers of the petitions that there would be reprisals, but until the circulators of the petitions were transferred there was no official indication that the authorities objected. This court is unable to find that the situation represented so clear and present a danger to the security of the prison as to justify transfer without warning.

Moreover, it is quite evident that to be located at Wallkill is a status prized by inmates. The advantages of the facility over other correctional institutions are numerous. Whether it is deemed a right or a privilege, the interest in continuing to be situated there is sufficiently great that transfer in direct response to his activity deserves some sort of "due" process, at the very least the knowledge that it is a possibility.

It is also evident that the transfer procedure, while termed "administrative," is at Wallkill at least used for disciplinary purposes. The record shows that the arsenal of disciplinary measures available in other institutions is less complete at Wallkill: there are no rooms for segregation aside from two infirmary rooms; the cells themselves are not locked; it is not feasible to isolate one inmate for special sanctions. Thus, if an inmate is found to be disruptive of the general rehabilitative scheme of the prison the only alternative is to transfer him. And he can only be transferred to a higher security, less desirable, institution. This, combined with the high value placed by the inmates themselves on their assignment to Wallkill, makes this "administrative" tool also a powerful disciplinary device. The fact that it is also used for purely administrative reasons in some instances does not shield it from the requirements of due process (of whatever appropriate form) when it is used and perceived as a disciplinary device.

Thus, the court today holds that on the facts before it, defendants' use of the transfer procedure violated plaintiff's right to due process at the most fundamental level: plaintiff was not informed of the "rules of the game" nor of the possible sanctions for their violation, yet was subjected to significant loss when he "transgressed." It matters not that the authorities have the power to regulate the activities of the inmates in their discretion, or to transfer the inmates for a wide range of reasons; even notice of the charges and a hearing after the offense would not bring this situation within the parameters of the process that was due. The court also notes that in this circumstance transfer was as much a disciplinary measure as others for which an administrative hearing is provided in the prison rules.

Plaintiff has requested injunctive relief restraining defendants *in futuro* from imposition of any further punitive transfers of plaintiff from Wallkill to any other correctional facility without affording him his procedural due process rights, including but not limited to written notice of the charges, knowledge of the facts upon which the transfer was based, a hearing before an impartial tribunal and an opportunity to question and challenge this basis. He contends that he is under continuing fear of summary transfer for the exercise of his First and Sixth Amendment rights.

This court is not persuaded that the threat of transfer is sufficiently great at this time to justify granting the injunctive relief sought by plaintiff. In the context of the present case it is sufficient to require that the prison authorities make known to plaintiff the scope of permissible behavior and the circumstances which in their judgment would warrant transfer.

Plaintiff also requests an order to expunge all record of the transfer from his file. Since it has been represented to the court that an explanatory note has been included with the record of transfer, and that no action adverse to plaintiff, whether with reference to parole or discipline, will be based on this information, this request is also denied.

The foregoing constitutes the findings of fact and conclusions of law of the court for the purposes of Rule 52, Fed. R. Civ. P.

Settle judgment on notice.

Dated: October 9, 1973

ROBERT J. WARD
U. S. D. J.

NOTES

[1] *See, Price* v. *Johnston*, 334 U.S. 266 (1948); *Sostre* v. *McGinnis*, 334 F.2d 906, 980 (2d Cir. 1964), *cert. denied*, 379 U.S. 892 (1964); *Fortune Society* v. *McGinnis*, 319 F. Supp. 901, 904 (S.D.N.Y. 1970); *Carothers* v. *Follette*, 314 F. Supp. 1014, 1023-24 (S.D.N.Y. 1970).

In *Sobell* v. *Reed*, 327 F. Supp. 1294 (S.D.N.Y. 1971), Judge Frankel of this Court Stated:

> "Whatever may once have been the case, it is not doubtful now that the Constitution, and notably the First Amendment, reaches inside prison walls. The freedoms of conscience, of thought and expression, like all the rest of life, are cramped and diluted for the inmate. But they exist to the fullest extent consistent with prison discipline, security and 'the punitive regimen of a prison. . . .'" at 1303.

[2] *Pierce* v. *LaVallee*, 293 F.2d 233, 235 (2d Cir. 1961); *Fortune Society* v. *McGinnis*, *supra* at 904; *Sobell* v. *Reed*, *supra*; *Goodwin* v. *Oswald*, 462 F.2d 1237, 1241 (2d Cir. 1972) and cases cited at 1241, 1242.

[3] *See, e.g., McCloskey* v. *State of Maryland*, 337 F.2d 72 (4th Cir. 1964); *Roberts* v. *Pepersack*, 256 F. Supp. 415 (D. Md. 1966); *Sostre* v. *McGinnis*, *supra*.

[4] *See, e.g., McCloskey* v. *State of Maryland*, *supra* at 74.

[5] *Landman* v. *Royster*, 333 F. Supp. 621 (E.D. Va. 1971),

> "The Court concludes, therefore, that the existence of some reasonably definite rule is a prerequisite to prison discipline of any substantial sort." (at 656)

[6] "In most cases it would probably be difficult to find an inquiry minimally fair and rational unless the prisoner were confronted with the accusation, informed of the evidence against him . . . and afforded a reasonable opportunity to explain his actions." *Sostre* v. *McGinnis*, 442 F.2d at 198.

[7] See the cases cited in *Sostre*, 442 F.2d at 198-199.

[8] This issue was raised but not decided in *Goodwin* v. *Oswald*, 462 F.2d 1237 (2d Cir. 1972). In a concurring opinion Oakes, J. expressed the view that nothing in the constitutional or statutory law forbids such activity (at 1245) but the decision itself was based upon the well-established protection of inmates' correspondence with their attorneys.

Appendix D

Decision of District Court, dated July 31, 1972.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

JAMES NEWKIRK and CORNELIUS LUCAS,

Plaintiffs,

against

HAROLD N. BUTLER, Superintendent of Wallkill Correctional Facility, and PETER PREISER, Commissioner of Correctional Services,

Defendants.

To grant plaintiffs the relief which they seek on this motion for a preliminary injunction would give them substantially everything which they could obtain if they were successful after a trial. Defendants' opposing affidavits raise a serious question as to whether plaintiffs are entitled to this relief. Plaintiffs have not at this point demonstrated that there is a strong likelihood of their ultimate success. Moreover, the injury that plaintiffs will suffer in remaining at their present prisons pending trial, while no doubt "irreparable" in the sense that they cannot live the next few months over again, does not impress me as being severe. On the other hand, to require respondents to retransfer plaintiffs at this time might well be injurious to security at Wallkill and perhaps even injurious to plaintiffs themselves.

The court is satisfied that the best way to determine the issues in this case is to bring it on for trial as promptly

as possible. In the exercise of the court's discretion, plaintiffs' motion for a preliminary injunction is denied. Counsel are requested to meet with the court in Room 2001 at 2:00 P.M. on Wednesday, September 6, 1972 to fix a date for trial.

So ordered.

Dated: July 31, 1972

/s/ EDWARD C. MCLEAN
U.S.D.J.